Filed 11/2/09 In re Isaiah P. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ISAIAH P., a Person Coming under the Juvenile Court Law ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. HERBERT P., Defendant and Appellant.	G041782 (Super. Ct. No. DP015354) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen, and Aurelio Torre, Deputy County Counsel for Plaintiff and Respondent.

* * *

Defendant Herbert P. (father) appeals from an order terminating his parental rights over his two-year-old son, Isaiah P., and placing Isaiah for adoption. He contends the court wrongly failed to apply the statutory "benefit exception" that allows a court to forgo terminating parental rights when selecting a permanent plan for an adoptable child. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)[1] While father showed genuine affection for Isaiah, he failed to develop a significant parental relationship that would benefit Isaiah more than the stability of adoption. We affirm.

FACTS

Background

We reviewed the relationship between father and Isaiah in a prior opinion affirming a series of March 2008 orders. (*Herbert P. v. Superior Court* (July 8, 2008, G040116) [nonpub. opn.].) In affirming the order asserting jurisdiction over I.P., we noted, "Isaiah's brother, Joshua, suffered serious physical harm as a result of mother's and father's inadequate protection — father does not claim otherwise. Isaiah faced a substantial risk of suffering the same kind of harm. Mother never treated her substance abuse, which caused Isaiah to test positive for methadone and diphenhydramine at birth. She refused to quit methadone so Isaiah could take untainted breastmilk, conceding '"[t]hat's never going to happen."' Father did not protect Isaiah from mother's substance abuse. Father also failed to cooperate with hospital workers, not understanding why Isaiah — born in a toilet with drugs in his system — needed medical care. Mother and father each suffered from untreated mental health problems. Mother made disjointed, unsubstantiated accusations against her sister (Isaiah's caretaker), routinely missed visitations, and appeared to lose touch with the passage of time. Father's paranoid

[1] All further statutory references are to the Welfare and Institutions Code.

delusions led him to reject service referrals, disdain medical professionals and threaten social workers, see nonexistent conspiracies against him and Isaiah, fixate on minor issues like diaper rash while ignoring major threats to Isaiah's welfare, and hallucinate. The court had ample evidence to conclude Isaiah was at a risk of suffering serious physical harm from mother and father." (*Id*. at p. 7.)

In affirming the order vesting custody of Isaiah with Orange County Social Services Agency, we held, "[s]ubstantial evidence shows Isaiah would have faced a substantial risk of danger, with no reasonable means of protection, if returned to father's care. Most notably, father continually fell further and further into the grasp of his untreated paranoid delusions. He accused the Department of Homeland Security of stealing children's identities, thought he was being followed at court, and suspected his lawyer of conspiring with a social worker. By January 2008, father was talking aloud to himself and hallucinating, seeing angels and devils, claiming to be a 'warrior angel,' relying on God to exact revenge on Isaiah's caretaker, contending the light of God made the judge squint and his lawyer put on glasses, staring at walls, and predicting some unspecified upheaval for the United States. Isaiah faced further dangers from father's unwarranted confidence in mother. Father believed mother was a good parent, despite her own untreated mental health problems and substance abuse, and vowed to continue living with her. The record sufficiently supports the court's determination to place Isaiah in SSA's custody." (*Herbert P. v. Superior Court*, *supra*, G040116, at pp. 8-9.)

In affirming the order denying reunification services to father and setting a section 366.26 hearing (.26 hearing) for Isaiah, we held, "father had failed to make reasonable efforts to treat the domestic violence and mental health problems that led to Joshua's removal and the termination of father's parental rights. Father fails to cite any evidence showing he sought any treatment whatsoever for these problems. And the record amply shows father's paranoid delusions spiraled unabated. His reliance on isolated periods of lucidity and appropriate behavior does not show a reasonable effort to

treat his problems." (*Herbert P. v. Superior Court*, *supra*, G040116, at p. 9.) We also rejected father's claim reunification services would nonetheless be in Isaiah's best interests. We noted, "Isaiah had spent all of his life out of father's custody, except for the first six weeks. Father's deteriorating mental health offered Isaiah little stability. Although father showed commendable affection towards Isaiah during visitations, these brief interludes do not warrant delaying the selection and implementation of a permanent plan for Isaiah." (*Id.* at p. 10.)

Finally, we affirmed an order reducing father's visitation to one 2-hour session per month. We noted "[f]ather was not entitled to any visitation at all. The court's decision to grant him two hours of visitation per month 'amounts to a windfall to father, not a violation of his rights.' [Citation.] Moreover, father's paranoid delusions became increasingly apparent over time, amply warranting restricted visitation." (*Herbert P. v. Superior Court*, *supra*, G040116, at p. 10.)

Visitations and the .26 Hearing

Isaiah was placed with nonrelated extended family members in October 2007, where he lived with his older brother, Joshua. Isaiah was "comfortable," "at ease," "thriving," "happy," and "secure" there. He "interact[ed] well with his brother" and was "affectionate and loving towards the prospective adoptive parents." The prospective adoptive parents "enjoy[ed] showering Isaiah with love and affection," "provid[ed] for his care and needs on a daily basis," and were "committed to [Isaiah's] developmental, educational, medical, physical, and social needs." They consistently stated they wanted to adopt Isaiah.

After the court issued its series of orders in March 2008, father had supervised visitation with Isaiah in May and June 2008. Father was "attentive" and Isaiah "appeared very comfortable with the father." They played, read, and ate snack. Father hugged and kissed Isaiah and was otherwise affectionate toward him. Isaiah was

not distressed when the May visitation ended, but cried for three minutes after the June visit.

Father missed his July 2008 visit.

At his August 2008 visit, father was "very concerned and attentive to Isaiah." He "took [Isaiah] out of his stroller and held him for about ten minutes before he sat down. [Isaiah] was very comfortable with this and laid his head on [father's] shoulders." Isaiah reached for father as he left and "cried for a short period," but "was able to calm himself as he was leaving." The September visit was similar. At the end, Isaiah held father's hand and did not want to leave with the social worker. The October visitation did not occur due to an innocent miscommunication between father and the social worker.

At a make-up visitation in November 2008, father held Isaiah as he slept. Father later gave Isaiah a snack and changed his diaper. When father placed Isaiah in the stroller at the end of the visit, Isaiah "whined a little and held out his arms [towards] the father to be picked up." Father picked him up for another minute, then put him back. When Isaiah saw his prospective adoptive mother after the visit, Isaiah "had giggles and kicked with excitement" "as he was trying to get out of the stroller to go to her." At the regular November visit, father fed Isaiah a snack and held his hand as they walked outside in the yard. Father placed Isaiah in his stroller uneventfully, and Isaiah later "kicked and laughed with excitement when he saw his prospective adoptive parent."

Father missed the December 2008 visitation because he had been incarcerated for 45 days. At the January 2009 visit, father "was very attentive to [Isaiah] while he was playing outside." At the February 2009 visit, father fed a snack to Isaiah and let him push his stroller around. Isaiah disobeyed father, and father gave him a "time out." Isaiah would not sit still, so father held him on his lap. Isaiah screamed, but eventually calmed down. Father then gave him some more snacks and made "cookie monster" noises that caused Isaiah to laugh.

The court held the .26 hearing in March 2009. The court admitted into evidence and reviewed the social worker's reports chronicling the visitations. Two social workers who had monitored visitations testified, as did father.

After the hearing, the court found by clear and convincing evidence Isaiah was likely to be adopted. It further found that terminating parental rights and placing Isaiah for adoption was in his best interests, though it acknowledged "the love that [father] has for his son Isaiah."

The court declined father's request to apply the benefit exception. It found "there was regular contact within the confines of the allowed visitation. [Father] was very regular in his contact in his visitation. He enjoyed his time with his son. He was — always had a good time. And it was clear that even when he — on those rare occasions when he missed visitation, it was something beyond his ability to prevent . . . , and he made up the visitation."

But the court found "the benefit to Isaiah of maintaining the parent-child relationship does not outweigh the benefit of adoption." It found "father's acts with Isaiah, while benevolent and loving, are those of any caretaker or any babysitter who might be in a similar situation for that period of time on a given month. And that does not [mean] to in any way minimize the father's love for Isaiah, but that is the situation that the court finds based on the evidence before it."

DISCUSSION

"'A section [.26 hearing] is a hearing specifically designed to select and implement a permanent plan for the child'" after the denial or failure of reunification services. (*In re Celine R.* (2003) 31 Cal.4th 45, 52 (*Celine R.*).) Of the possible plans, "'[a]doption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.'" (*Id.* at p. 53.)

Thus, "[i]f the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) "[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*Celine R.*, *supra*, 31 Cal.4th at p. 53.)

The benefit exception is one such specified circumstance. It allows the court to forgo terminating parental rights at the .26 hearing when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

"[T]he [benefit] exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. The [benefit] exception is not a mechanism for the parent to escape the consequences of having failed to reunify." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*).)

Instead, the parent bears the burden of showing "the [parent-child] relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).)

"[A] *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) "[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*Ibid.*; accord *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 (*Beatrice M.*) [exception inapplicable where "[parents] had not occupied a parental role in relation to [the children] at any time during their lives"].)

"[T]he child's relationship [with the parent] must transcend the kind of relationship the child would enjoy with another relative or family friend." (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523 (*Jeremy S.*), disapproved in part on a different point in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) The parent may not invoke the benefit exception merely because he or she "occupied a pleasant place in [the child's] life" (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 (*Elizabeth M.*)) or interacted with child as a "'friendly visitor' and 'family friend'" (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576). Even "frequent and loving contact" is not "sufficient to establish the 'benefit from a continuing relationship' contemplated by the statute" in the absence of a true parent-child relationship. (*Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.)

"The 'benefit exception' . . . may be the most unsuccessfully litigated issue in the history of law. . . . [I]t is almost always a loser." (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5 (*Eileen A.*), disapproved in part on a different point in *In re Zeth S.*, *supra*, 31 Cal.4th at pp. 413-414.) "[I]t is virtually impossible for a parent who was *denied* reunification services at the very beginning of the case to successfully assert the exception." (*Eileen A.*, at p. 1255.) "Because a [.26 hearing] occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the

Legislature's preference for adoptive placement." (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

Showing a sufficiently beneficial parent-child relationship is also "'difficult . . . in the situation, such as the one here, where the parents have . . . [not] advanced beyond supervised visitation.'" (*Jeremy S., supra*, 89 Cal.App.4th at p. 523.) "One can know a child's interests, enjoy playtime together, and be a loved relative, but not occupy a parental role in the child's life." (*Ibid*.)

Here, the court did not err by declining to apply the benefit exception.[2] Once a month for two hours, father would hold Isaiah, play with him, feed him snacks, change his diaper (both provided by the prospective adoptive parents), and hug and kiss him. Such attention and affection is commendable — but ultimately insufficient to invoke the benefit exception. "[A] *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one." (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) "[T]he child's relationship [with the parent] must transcend the kind of relationship the child would enjoy with another relative or family friend." (*Jeremy S., supra*, 89 Cal.App.4th at p. 523.) "One can know a child's interests, enjoy playtime together, and be a loved relative, but not occupy a parental role in the child's life." (*Ibid*.; accord *Elizabeth M., supra*, 52 Cal.App.4th at p. 324 ["pleasant place in [the child's] life" insufficient]; *Autumn H., supra*, 27 Cal.App.4th at p. 576 [interaction as a "'friendly visitor' and 'family friend'" insufficient]; *Beatrice M., supra*, 29 Cal.App.4th at p. 1418 ["frequent and loving contact" insufficient].) As the court aptly noted, "father's acts with

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[2] Some cases review the decision on the benefit exception for substantial evidence. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Others look for an abuse of discretion. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge." (*Ibid*.) We need not take sides in this debate because the court did not err under either deferential standard.

Isaiah, while benevolent and loving, are those of any caretaker or any babysitter who might be in a similar situation for that period of time on a given month."

Father fails to show he developed the kind of parent-child relationship with Isaiah that outweighs the legislative preference for the stability of adoption. (See *Celine R.*, *supra*, 31 Cal.4th at p. 53; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Father had custody of Isaiah only for the first six weeks of his life, hardly enough time to create such a relationship. Reunification services were denied to father because "father had failed to make reasonable efforts to treat the domestic violence and mental health problems that led to Joshua's removal" and his "paranoid delusions spiraled unabated." (*Herbert P. v. Superior Court*, *supra*, G040116, at p. 9.) Nothing in the record reasonably suggests father overcame his problems and his distance from Isaiah to develop a strong parent-child relationship during the two hours a month he visited with Isaiah. (See *Jeremy S.*, *supra*, 89 Cal.App.4th at p. 523 [it is "'difficult'" to show sufficient benefit "'where the parents have . . . [not] advanced beyond supervised visitation'"] see also *Eileen A.*, *supra*, 84 Cal.App.4th at p. 1255 ["it is virtually impossible" to show sufficient benefit when reunification services are denied].)

Father relies upon easily distinguished cases. In *In re S. B.* (2008) 164 Cal.App.4th 289 (*S.B.*), the father "was S.B.'s primary caregiver for three years. . . . When S.B. was removed from his care, [the father] immediately recognized that his drug use was untenable, started services, maintained his sobriety, sought medical and psychological services and maintained consistent and regular visitation with S.B. He complied with 'every aspect' of his case plan.'" (*Id.* at p. 298.) The father visited S.B. several times a week (*id.* at p. 295) and "continued the significant parent-child relationship *despite* the lack of day-to-day contact with S.B. after she was removed from his care." (*Id.* at p. 299.) In *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*), the mother had custody of her three children — ages seven, five, and three years — for five years, three years, and seven months respectively. (*Id.* at p. 689.) The mother "visited as

often as she was allowed and acted in a loving, parental role with the children when permitted visitation. She was devoted to them and did virtually all that was asked of her to regain custody." (*Id*. at p. 690.) The oldest child shared "'a primary attachment' and a primary maternal relationship'" with the mother (*id*. at p. 689), the middle child "had difficulty separating from her" (*ibid*.), and the youngest was "very strongly attached to her" (*id*. at p. 690).

This case lacks the unusually compelling facts present in *S.B.* and *Amber M*. Father was not Isaiah's caregiver for a number of years, as were the parents in *S.B.* and *Amber M*. Father did not "compl[y] with 'every aspect' of his case plan" (*S.B.*, *supra*, 164 Cal.App.4th at p. 298) or do "virtually all that was asked of [him] to regain custody" (*Amber M.*, *supra*, 103 Cal.App.4th at p. 690.) No psychologist or social worker ventured that Isaiah had "'a primary attachment' and a primary [paternal] relationship'" with father; nor does the record show Isaiah "had difficulty separating from [father]." (*Id*. at p. 689.) Isaiah fussed occasionally at the end of a visitation, but not at others, and was excited to be reunited with his prospective adoptive parents. And father visited with Isaiah once a month for two hours, not "two or three times a week." (*S.B.*, *supra*, 164 Cal.App.4th at p. 295.)

To be sure, father loves Isaiah and Isaiah enjoys visiting with father. But at this late stage, Isaiah "should not be deprived of an adoptive parent" in order to perpetuate a relationship with father that is "beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Isaiah's strong relationship with the prospective adoptive parents and the stability that comes with adoption simply outweighs father's caring — but nonparental — relationship with Isaiah.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.